In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., and
CHRONICLE PUBLISHING CO.,
Petitioners,

vs.

OLIVIA NIEMI, a Minor, by and through her
Guardian ad Litem, Valeria Pope Niemi,
Respondent.

AMICUS CURIAE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE, CALIFORNIA MEDICAL ASSOCIATION

California Medical Association is a non-profit unincorporated association consisting of a membership of over 27,000 physicians and surgeons from throughout the State of California. It is the largest state medical association in the country.

California Medical Association and its members share a common objective of promoting good physical

and mental health. In furtherance of that objective, the physicians of the California Medical Association are concerned about the impact which violent television programs have on the mental and physical health of the young. Over 146 studies have shown TV violence to have serious harmful effects on the health of Americans, especially children. In this case a nine-year-old girl who suffered the traumatic consequences of violent television programming was denied her day in court by the trial judge. The California Court of Appeal properly reversed that decision. For the legal, social and medical reasons set forth herein, Amicus Curiae, California Medical Association, respectfully submits that certiorari should be denied in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the First and Fourteenth Amendments to the United States Constitution, which are set out *verbatim* in the Petition (pages 2-3), this case involves California's constitutional guarantee of the right to a jury trial in civil cases:

> Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.
>
> In civil causes and cases of misdemeanor the jury may consist of 12 or a lesser number agreed on by the parties in open court. (Calif. Const., art. I, §16.)

Also relevant to the Court's determination is California Civil Code Section 3523, which restates the common law principle that:

> For every wrong there is a remedy.

QUESTION PRESENTED

Does the First Amendment vest in broadcasters absolute immunity from civil accountability for the foreseeable results of a broadcast which created an undue risk of harm?

STATEMENT OF THE CASE

On September 10, 1974, at 8:00 p.m., NBC aired a made-for-television movie called "Born Innocent." In the opening minutes of that movie, television viewers, young and old, saw a violent and bizarre scene unfold before them: Linda Blair (a child actress who starred in "The Exorcist") was portraying a 15-year-old inmate in a school for wayward girls. As the scene opens, she is shown entering a community bathroom to take a shower. She is then shown taking off her clothes and stepping into the warm shower water, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes onto her face. Four adolescent girls are standing across the shower room. One is carrying a plumber's helper, waving it suggestively by her hips. The older girls tell Ms.

Blair to get out of the shower. She steps out fearfully. Then the four girls violently attack the younger girl, wrestling her to the floor. She is shown naked from the waist up, struggling as the older girls force her legs apart. Then the girl with the plumber's helper is shown making intense thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor.

Three days later in San Francisco, on September 13, 1974, a nine-year-old girl was attacked by four adolescents (three girls ages 15, 14 and 11, and a boy aged 15), and was artificially raped with a bottle. The young attackers admitted to police that they were inspired to do this act by the movie "Born Innocent".

NBC presented this movie at an hour when much of the television audience is comprised of children. The network was clearly aware of the potentially youthful audience. It had expressly solicited the Disney Corporation as a sponsor. It also advertised and marketed the program in such a way as to encourage children to watch "Born Innocent." For example, NBC took out a two-page advertisement in TV Guide. On one page they advertised the Monday night movie, featuring the well-known story about lion cubs, "Born Free", while the flip side of the page encouraged the viewers to watch the Tuesday night movie at the same hour, "Born Innocent."

Now little Olivia Niemi, the nine-year-old victim of the San Francisco attack is suing NBC and KRON-TV. She has alleged negligence and intentional wrong-

ful conduct by the broadcasters in presenting this program which eventually led to the traumatic physical and mental harm inflicted on her. The defendants, however, argue that, as a matter of law, the First Amendment vests broadcasters with an absolute immunity from civil liability for foreseeable personal injuries arising out of their programming. Amicus Curiae, California Medical Association, believes that there is no such immunity under the First Amendment and that it is in the interest of the health of all Americans, especially our children, to hold broadcasters civilly accountable for acts which lead to foreseeable harm.

PROCEEDINGS BELOW

On October 9, 1974, Respondent filed a Complaint For Damages, alleging Petitioners' negligent and willful misconduct. (Appendix G to the Petition.) Like any other complaint for negligence it pled duty, breach, causation and damages, and added a separate count for willful or reckless misconduct.

Subsequently, Petitioners made a motion for summary judgment in which they asserted as a matter of law that broadcasters are immune under the First Amendment from liability for negligent or wrongful programming. (CT 42-65.) The Superior Court rejected that argument (CT 116) and the California Court of Appeal denied a Writ of Mandate seeking to overturn the trial court's determination (Appendix H to Petition).

On September 13, 1976, the case proceeded to trial, but before the first juror was impaneled, the trial judge asked to view the film. After seeing the film, and amidst some confusion, the trial judge ruled that the Plaintiff was barred from proceeding any further by the First Amendment and dismissed the entire action. The trial judge referred to his ruling as a judgment on the pleadings. (CT 184; RT 86.) At the time, however, he had viewed the film and had heard argument of a factual nature. (CT 183-185.) He also subsequently issued a document entitled "Findings of Fact and Conclusions of Law" (CT 187-187a). Such Findings would be procedurally inconsistent with a judgment on the pleadings, in which supposedly all well-pleaded facts are taken as true.

On October 26, 1977, the California Court of Appeal held that in his ruling the trial judge had committed "reversible error" and "had acted in excess of jurisdiction" in denying Plaintiff her right to a jury trial under California Constitution, Article I, section 16. (74 Cal. App. 3d at 389, 141 Cal. Rptr. at 514, Appendix A to Petition at 6a.) On November 7, 1977, the California Court of Appeal denied a Petition for Rehearing (Appendix B to Petition), and on January 19, 1978, the California Supreme Court declined to review the Appellate Court's ruling (Appendix C to Petition). Applications for a Stay of the Proceedings below have been denied both by the California Court of Appeal and by Justice Rehnquist (46 U.S.L.W. 3523). The matter is currently set for trial to commence on June 26, 1978.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE CALIFORNIA COURT OF APPEAL'S DECISION RESTS PRIMARILY UPON CALIFORNIA PROCEDURAL LAW AND THE CALIFORNIA CONSTITUTION.

Procedurally, the trial court was deemed acting "in excess of its jurisdiction" when it entered its "judgment on the pleadings." Under California law, in ruling on the pleadings, the trial judge is required to confine his consideration solely to the pleadings before him and treat all matters properly pleaded as true and indulge every inference therefrom in plaintiff's favor. (See, *Colberg, Inc. v. State of Calif. ex rel. Dept. Pub. Wks.*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967).)

Here, before the jury was impaneled, the trial judge took a portion of the defendants' evidence, i.e., the film, and made a ruling on the entire case. He later backed the ruling up by "Findings of *Fact* and Conclusions of Law." As noted, however, California procedural law prohibits any determination of facts on a motion for judgment on the pleadings. This procedural confusion caused Justice Rattigan of the California Court of Appeal to comment after NBC's oral argument, "I still don't understand what happened at the trial court level."

In denying Petitioners' application for stay in this matter, Justice Rehnquist observed:

> A reading of the opinion of the Court of Appeal indicates that it might have been based on a state procedural ground, by reason of the fact that the trial judge after denial of a motion for sum-

> mary judgment but before the empanelment of a jury himself viewed the entire film and rendered judgment for applicants because he found that it did not 'advocate or encourage violent and depraved acts and thus did not constitute an "incitement".' The Court of Appeal held that this was a violation of respondent's right to trial by jury guaranteed her by the California Constitution. . . . The contours of California tort law are regulated by the California courts and California Legislature, subject only to the limitations imposed on those bodies by the United States Constitution and laws and treaties enacted pursuant thereto. (46 U.S.L.W. 3523-24.)

The fact is that under California law there is no cognizable motion which would allow a judge, before impaneling a jury, to hear only part of one side of a case and then dismiss the entire action. The Appellate Court, therefore, properly reversed the trial court's decision, declaring that it was a denial of Plaintiff's right to jury trial under the State Constitution. (Calif. Const., art. I, §16.)

II. CERTIORARI SHOULD BE DENIED BECAUSE THE LACK OF AN EVIDENTIARY RECORD MAKES DETERMINATION OF CONSTITUTIONAL ISSUES PREMATURE.

In its decision, the California Court of Appeal observed:

> Here, it is appropriate to acknowledge that, if the cause had proceeded properly to trial before a jury and a verdict awarding damages to appellant had been the result, it would have been

> the responsibility of the trial court, or perhaps of this court on appeal, to determine upon a reevaluation of the evidence whether the jury's fact determination could be sustained against a First Amendment challenge to the jury's determination of a 'constitutional fact.' (*Rosenbloom v. Metromedia, supra,* 403 U.S. 29, 54, 91 S.Ct. 1811, 29 L.Ed. 2d 296.) But the case is not presently ripe for such a determination, appellant having been deprived of her constitutional right to present before a jury evidence which she contends will show that, despite First Amendment protections, the showing of the film, "Born Innocent," resulted in actionable injuries. (Cf. *Weirum v. RKO General, Inc.* (1975) 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36.) (74 Cal. App. 3d at 389-90, 141 Cal. Rptr. at 514, Appendix A at 6a.)

The procedural posture of this case brings it now to the United States Supreme Court without any evidentiary record—except for the film itself. Yet, this is a negligence action based not solely upon the content of the film but upon the acts and activities of the broadcasters in selecting the time for airing, the advertising for the program, etc. The issues of fact related to the broadcasters' duty, breach and causation (foreseeability) have not been established. It is possible, though not likely, that at the trial (which is now set to commence on June 26, 1978) Plaintiff will fail to prove one of these elements rendering the constitutional issues moot.

Finally, unless the Supreme Court is willing to declare that the First Amendment vests broadcasters

with absolute immunity from this kind of liability, the First Amendment would operate as a *qualified* privilege only, dependent upon the facts and circumstances surrounding the broadcast. None of the relevant factual information is before the Court at this time. So, in essence the Court is being asked to render an advisory opinion on the issue of absolute First Amendment immunity for broadcasters. As argued in the following sections of this brief, however, the granting of such immunity would be a gross violation of sound constitutional and social principles.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE CONSTITUTIONAL ISSUE HAS ALREADY BEEN DECIDED BY THE CALIFORNIA SUPREME COURT.

The supposed constitutional issue of whether or not the First Amendment is a defense to a negligence action against broadcasters has already been decided in California. The California Supreme Court has expressly recognized that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act." (*Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975).) In the *Weirum* case, the State Supreme Court upheld a verdict against a broadcaster for negligent programming.

Amicus Curiae submits that the issue in the *Weirum* case, as stated by the Court, and the issue in the present case are the same:

> The issue here is *civil accountability for the foreseeable results of a broadcast which created*

> *an undue risk of harm* . . . . (*Weirum* at p. 48.) (Emphasis added.)

The factual parallels in the *Weirum* case and the present case are so numerous that the *Weirum* case must be held to be dispositive:

(1) Both broadcasts were directed at a largely youthful audience;

(2) Both broadcasts led young people to act irresponsibly;

(3) Both broadcasts led to serious physical harm caused by the young people acting irresponsibly under the influence of the broadcast.

In the *Weirum* case, the Court specifically held that there was *no* First Amendment privilege, and thus upheld the verdict against the broadcaster. Any factual distinctions between the *Weirum* case and the present case go only to the question of foreseeability of harm—a question of fact for the jury to determine, not a question of law for the judge to decide based on a viewing of the film alone. Clearly, the applicability of *Weirum* to this case depends upon the development of the facts, but Plaintiff was wrongly denied her day in court. The decision of the Court of Appeal granting Plaintiff her day in court need not and should not be reversed.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE HEALTH AND WELFARE OF OUR SOCIETY DEMANDS THAT BROADCASTERS BE ACCOUNTABLE FOR THEIR PROGRAMMING.

A. Scientific Studies To Date Have Shown Overwhelmingly That Television Is A Violent Medium.

Television invades the homes of nearly all Americans. Its programming clearly affects our way of life. It brings us in immediate contact with the world around us—and even beyond—as far away as the moon. More importantly, though, it has the power to shape our perception of our world.

Television is an especially powerful influence on the impressionable minds of the young. It serves as tutor as well as babysitter. According to the Nielson index figures for TV viewing, it is estimated that by the time a child graduates from high school he has had 11,000 hours of schooling as opposed to 15,000 hours of television. Over TV he will have witnessed by that time some 18,000 murders and countless highly detailed incidents of robbery, arson, bombings, shootings, beatings, forgery, smuggling, and torture—averaging approximately one per minute in the standard television cartoon for children under the age of ten.[1] In general, seventy-five percent of all network dramatic programs contain violence with over seven violent episodes per program hour.[2] More than half

[1]Rothenberg, "Effect of Television Violence on Children and Youth," *The Journal of the American Medical Association* (*JAMA*), pp. 1043-46 (December 8, 1975).

[2]Studies by G. Gerbner, published in part in Hicks & Liebert, *The Early Window, Effects of Television on Children and Youth*, 25, 26 (1973).

of all characters on prime time television are involved in some violence, about one-tenth in killing.[3]

B. As TV Violence Becomes More A Part of The American Way Of Life, Our Society Itself Becomes More Violent, Seriously Affecting the Mental and Physical Health of All Members Of Our Society, Especially Children.

There has been a dramatic rise of violence in our society. In 1973, more than 5,000 young Americans from 15 to 24 years of age were murdered, and an additional 4,000 committed suicide. The death rate for this age group was 19% higher in 1973 than in 1960, due entirely to deaths by violence. Murder is the fastest growing cause of death in the United States. The age group most involved, with the greatest number of both victims and arrests, is 20 to 24. In 1972, 17% of all homicide victims and 24% of all arrests were in this age group. The age group of 15 to 19 account for another 9% of all murder victims and nearly 19% of the arrests.[4]

The medical profession has determined that one of the factors behind this violence is televised violence. Based on the overwhelming scientific and medical evidence, the American Medical Association at its December 1976 annual meeting, acting on a resolution introduced by the California delegation, declared violence on TV to be an environmental health risk and asked doctors, their families and their patients to

[3]Gerbner & Gross, "The Scary World of TV's Heavy Viewer," *Psychology Today*, pp. 41-45 (April 1976).

[4]Facts in this paragraph taken from Somers, "Violence, Television and the Health of American Youth," 294 *New Eng. J. of Med.* 811 (1976).

actively oppose programs containing violence, as well as products and services of the sponsors of such programs. Out of its sense of concern for the health of our society, the California Medical Association seeks to offer its medical guidance to this Court regarding the potential health dangers should broadcasters be vested with absolute immunity from liability for irresponsibly violent programming.

C. Studies Show That Television Violence Breeds Antisocial and Violent Behavior, Especially Among the Young.

Television has become a school of violence and a college for crime. A study of 100 juvenile offenders commissioned by ABC found that no fewer than 22 confessed to having copied criminal techniques from television. Last year, a Los Angeles judge sentenced two teenage boys to long jail terms after they held up a bank and kept 25 persons hostage for seven hours. In pronouncing the sentence, the judge noted disgustedly that the entire scheme had been patterned on an "Adam 12" episode the boys had seen two weeks earlier.[5]

The Surgeon General of the United States has said, based on a six-volume study of the problem, that "there is a causative relationship between televised violence and subsequent antisocial behavior and that the evidence is strong enough that it requires some action on the part of responsible authorities, the TV industry, the government, the citizens." In that report, the Surgeon General concluded that television violence can increase a child's aggressive behavior, especially if he has a predisposition for aggression. And, in addition to this, the predisposition itself can be caused by the viewing of television.[6]

[5]"What TV Does to Kids," *Newsweek*, 62 at 67 (February 21, 1977).

Dr. Robert Liebert, Associate Professor of Psychology at the State University of New York in Stony Brook, concluded in an overview of several studies of the Surgeon General's Report that "experimental studies preponderantly support the hypothesis that there is a direct, causal link between exposure to television violence and an observer's subsequent aggressive behavior."[7]

Furthermore, there are long-term effects from viewing violent television programs. In one ten-year study, investigators found a strong correlation between the early viewing of television violence and aggressive behavior in the teenage years. In fact, according to the study, a child's television habits at age 8 were more likely to be a predictor of his aggressiveness at age 18 than his family's socioeconomic status, his relationships with his parents, his I.Q. or any other single factor in his environment. The report concluded that a preference for violent television at a young age leads to the building of aggressive habits.[8]

[6]*Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior* (1972).

[7]*Id.*

[8]Hicks & Liebert, *The Early Window, Effects of Television On Children and Youth* (1973).

George Gerbner, Dean of the Annenberg School of Communications at the University of Pennsylvania, has also concluded from his studies that "people who watch a lot of TV see the real world as more dangerous and frightening than those who watch very little. Heavy viewers are less trustful of their fellow citizens." Gerbner also has found that the heavy television watcher gets a thick skin. He becomes conditioned to being a victim and apathetic to violence.[9]

All in all, 146 articles in behavioral science journals and related reports, representing 50 studies involving 10,000 children and adolescents from every conceivable background, all showed that viewing violence produces increased aggressive behavior in the young.[10] These facts cannot be ignored.

Petitioners have concocted a catch phrase for the purpose of their brief, labelling Plaintiff's theory "the tort of imitation." (E.g., Petition at pp. 4 and 9 *et seq.*) The complaint in this case, however, pleads traditional counts of negligence and intentional misconduct causing harm. Imitation is not a tort. To the contrary, it is the basis of all commercial television. The advertisements which pay the broadcasters their profits are designed to influence viewers' behavior, and sponsors *want* viewers to "imitate" the ads and buy their products. An established principle of advertising is that repeated exposure to a message will cause imitative behavior. Unfortunately that

[9]Gerbner, *supra*, note 2.

[10]Rothenberg, *supra*, note 1.

principle is not restricted to advertising. Studies have clearly shown that repeated exposure to televised violence leads to aggressive and violent behavior, especially in the young.

Dr. Albert Bandura of Stanford University set out to determine what happens to a child who watches aggressive personalities on television slug, stomp, shoot, and stab one another. His research reached two conclusions about aggression on TV: (1) that it tends to reduce the child's inhibitions against acting in a violent, aggressive method, and (2) the children will copy what they see.[11]

In the present case, the children who attacked Olivia Niemi did copy what they saw on television, and what they saw was an ugly rape of a little girl. The factual parallels between the movie and real life are too close: In the movie "Born Innocent" four older adolescent girls attacked a younger girl; in the present case there were four attackers, 3 female adolescents and one male adolescent, who attacked the younger girl. The rape in both cases was forcible and was accomplished by means of an artificial instrument. The attack on Olivia Niemi took place only three days after the attack was shown on television, and most importantly, the attackers admitted being influenced by what they had seen on the television screen. Because the children acted out what they saw, we now have a real life victim, with real life scars—brought to her by NBC.

[11]Bandura, *Aggression: A Social Learning Analysis* (1973).

V. CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST AMENDMENT DOES NOT CREATE ABSOLUTE IMMUNITY FROM LIABILITY FOR CONDUCT WHICH PROXIMATELY CAUSES HARM.

The First Amendment of the United States Constitution provides:

> Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .

Freedom of speech was recognized as a fundamental right and applied to the States in the case of *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930).

The freedom of speech, however, has *never* been interpreted to give anyone a blanket immunity from liability.[12] As this Court said in *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51, 81 S.Ct. 997, 1006-07, 6 L.Ed. 2d 105, 116-17 (1961):

> *At the outset we reject the view that freedom of speech and association [citation], as protected by the First and Fourteenth Amendments are 'absolutes.'* . . . Throughout its history, this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to

[12]For example, in *Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974), this Court refused to extend the First Amendment umbrella to shield a publisher or broadcaster from liability for injuries to a private individual resulting from the *negligent* publication of defamatory falsehoods. In upholding the Iowa statute, the Supreme Court held that as long as the requisite elements of negligence were proven, a publisher or broadcaster could be held civilly liable for injuries to reputation. Why should not the same principles apply to allow recovery from a broadcaster on a negligence theory for foreseeable personal injuries?

talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. See, e.g., *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919; *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed. 1356; *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 1498. On the other hand, general regulatory statutes, not intended to control the content of the speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. [Citations] (Emphasis added.)

In a note appended to the above-quoted text, the Court cites numerous examples of legally recognized limitations on free speech, such as libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, etc.. To that list could be added other torts committed by speech, such as negligent misrepresentation, interference with contractual or business relations, unfair competition and false imprisonment. Likewise, doctors, lawyers and other professionals may be held liable for bad advice, and yet the First

Amendment would not shield them from accountability for their speech-related activities. Why should the law treat broadcasters differently from other tortfeasors? If their conduct leads to foreseeable harm, they should be equally liable for the consequences.

Like any other enterprise, broadcasters should be required to weigh the risks of their activities before embarking on a commercial venture, and pay damages if they injure anyone. (See, e.g., discussion of "enterprise liability" in *Haft v. Lone Palm Hotel,* 3 Cal. 3d 756, 775 n. 20, 478 P.2d 465, 91 Cal. Rptr. 745 (1970).) Why should their liability be different because they sell air-time rather than some other product?

Furthermore, Plaintiff in the present action does not seek to impose liability on the basis of the defendants' words alone. *All* of the programming activities of the broadcasters must be scrutinized in determing their liability. The Court must keep in mind that *commercial television is a marketing medium.* Programmers know who is watching what and when. This information, in turn, is used in the purchasing of programs and then in selling the programs to sponsors. The sponsors have to know how many potential customers they may be reaching. The demography of the viewing audience and the potential selling power of the program is what the Nielson ratings are all about.

In the present case, NBC surely knew that the 8:00 o'clock evening hour would attract a large audience of young people. Why else would they solicit

the Disney Corporation as a sponsor? NBC was also surely aware of the potential impact of its advertisement on the flip pages in TV Guide which promoted "Born Free" and "Born Innocent" to be shown at the same hour only a day apart. Are these corporate marketing and programming decisions protected by the First Amendment?

Certainly, the programming activities of NBC in this case could be found harmful, especially to children. NBC received thousands of complaints after the airing of "Born Innocent," showing that viewers found the program offensive. Subsequently, the broadcasting association of which NBC was a member censured NBC for showing the program at 8:00 p.m., and caused NBC to delete most of the offensive rape scene from any future showings, and made them show the picture between 11:00 and 12:00 at night rather than at 8:00. Why were these programming precautions not taken in the first place? Should NBC be held immune from liability for the consequences of its programming decisions?

Irresponsible speech is not free: One cannot say just anything, anywhere, anytime, to anyone. As Justice Holmes noted with the simple wisdom that has made the statement a cliché, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic." (*Schenck v. United States,* 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470, 473 (1919).)

To uphold the trial court's ruling would be to place broadcasters above the civil law. It would be a viola-

tion of Plaintiff's right to equal protection under the law to hold the broadcaster immune, for if Plaintiff were injured by a tortfeasor other than a broadcaster she would have a remedy. To hold a broadcaster immune from liability would also violate Plaintiff's right to due process and would violate the fundamental principle of law which guarantees that for every wrong there is a remedy. (Calif. Civ. Code §3523.) Accordingly, the trial judge's ruling granting the broadcaster total immunity was properly reversed by the State Court of Appeal and that decision should not be disturbed.

CONCLUSION

Based upon the proper application of state law, combined with an appropriate interpretation of the First Amendment, the California Court of Appeal remanded this case for trial. There, a full record can be developed and the constitutional issue fleshed out with facts. Then at last, a little girl who was the victim of a corporate decision to air "Born Innocent" at the time and manner it was shown, will have her day in court.

Those seeking certiorari, however, would have this Court cloak television with absolute First Amendment immunity. In a society where 22% of juvenile crimes are copied from television, and where violence is becoming a national epidemic, can we afford to allow broadcasters, who have the power to reach into millions of homes and to shape the minds of the young, to be totally free from civil responsibility for their programming? The scientific evidence is overwhelm-

ing that TV violence causes violence on the streets. The physicians of California and of this country are warning us of the dangerous impact of violent television programming, particularly on our children.

We cannot ignore the profound social implications of their warning, just as we cannot ignore the compelling irony of the real life victim who was truly "born innocent." It would be a sad day if our social values come to cherish a few moments of television over the health and well-being of this little girl—not to mention the millions of children who physicians say are being psychologically damaged by television every day.

The law is clear. The First Amendment *cannot* be a shield from civil responsibility for foreseeable consequences of harmful acts. Neither the United States Supreme Court nor the California Supreme Court has ever so held. Thus, the procedurally irregular ruling of the trial court in granting a judgment on the pleadings after viewing the film as evidence was properly overturned. Therefore, to protect the lives and health of those likely to be endangered by unnecessarily violent television programming, the California Medical Association respectfully urges this Court to deny certiorari at this time.

Dated, April 13, 1978.

Respectfully submitted,

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